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Supreme Court of the United States

October Term, 1977

No. 76-1750

HAROLD D. STUMP, JOHN HINES, M.D.,
HARRY M. COVELL, M.D. and WARREN G. SUNDAY,
Petitioners,

v.

LINDA KAY SPARKMAN and LEO SPARKMAN,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE
and
BRIEF FOR AMICI CURIAE
AMERICAN COALITION OF CITIZENS WITH DISABILITIES; EPILEPSY FOUNDATION OF AMERICA; COUNSEL FOR HANDICAPPED PEOPLE; DEVELOPMENTAL DISABILITIES LAW PROJECT

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The American Coalition of Citizens with Disabilities, the Epilepsy Foundation of America, the Counsel for Handicapped People, and the Developmental Disabilities Law Project move this Court for permission to file the attached Brief Amici Curiae. The proposed *amici* are "consumer" and legal advocacy organizations who represent the interests of handicapped persons. These organizations and their

memberships are vitally interested in the outcome of this case as it regards the legal permissibility of compulsory sterilization of disabled individuals.

The American Coalition of Citizens with Disabilities, Inc. (ACCD) is a not-for-profit organization whose members include organizations of disabled individuals. ACCD's national members include the American Council of the Blind, Epilepsy Foundation of America, National Association for Retarded Citizens, National Association of the Deaf, National Association of the Physically Handicapped, National Paraplegia Foundation, Paralyzed Veterans of America, and United Cerebral Palsy Associations. ACCD seeks to speak with a unified voice advocating on behalf of the nation's entire disabled population. ACCD has taken an active role in attempting to remedy past practices of discrimination against physically and mentally handicapped citizens.

Epilepsy Foundation of America (EFA) is a non-profit organization established to promote research, support educational and vocational programs, and provide educational information in regard to epilepsy and the problems faced by persons having epilepsy. EFA's national office in Washington, D.C. is responsible for national programs which include advocacy and patient services. In the past, persons with epilepsy have been among those who have been singled out for compulsory sterilization and, as part of its public education and advocacy efforts, EFA has successfully labored for the repeal of involuntary sterilization statutes in many states.

The Counsel for Handicapped People is a not-for-profit corporation whose purpose is to promote, encourage, and secure the human and legal rights of handicapped people. The

organization seeks to secure equality under law for handicapped persons through the enactment and implementation of legislation, through educational efforts, through administrative processes, and through litigation. One of the major areas of concern of the Counsel for Handicapped People is the protection of the marital, sexual, and procreative rights of individuals who have physical and mental handicaps.

The Developmental Disabilities Law Project is a law reform/legal education program of the University of Maryland Law School whose purpose is to advocate on behalf of the legal rights of developmentally disabled (mentally retarded, cerebral palsied, epileptic, autistic, and other severely disabled) persons. One of the priority concerns of the Project is protection of disabled persons' rights in regard to procreation and sterilization, and the Project has been involved in research, publication, and litigational efforts regarding issues raised by compulsory sterilization. Among the specific accomplishments of the Project in this area of the law have been the preparation of two law review articles* and the involvement of a Project attorney as co-counsel in *A.L. v. G.R.H.*, 325 N.E.2d 501 (Ind. App. 1975), cert. den. 425 U.S. 936 (1976), which, as a relevant Indiana legal precedent, was and is a factor in the present case.

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* R. Burgdorf and M.P. Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 52 Temp. L.Q. 995 (1977); Gauvey & Shuger, *The Permissibility of Involuntary Sterilization Under the Parens Patriae and Police Power Authority of the State: In re Sterilization of Moore*, 6 Md. L. Forum 109 (1976).

The present case raises questions of the authority of judges to order the performance of involuntary sterilization operations in the absence of statutory authorization. To these questions, the proposed *amici* organizations would lend a perspective of the interests of disabled people generally, beyond the more confined presentations of the specific parties to this action. The proposed *amici* would present several factual and legal matters concerning the historical sources of compulsory sterilization, the reasons for its increasing disuse, and the legal questions it raises, which will not likely be provided to this Court by the parties in this case. The proposed *amici* hope to apprise this Court of the current status of involuntary sterilization practices in modern scientific philosophical, medical, and legal contexts, and to point out the grievous danger to handicapped citizens which would result if the modern trend of disfavor toward compulsory sterilization were to be reversed by permitting judges to authorize sterilizations in circumstances such as those in this case.

The proposed *amici* would also give voice to the personal interests and fundamental constitutional rights of handicapped people which are threatened by involuntary sterilization, and these organizations would argue the need for an appropriate remedy when such constitutional deprivations occur.

Some of the proposed *amici* organizations have devoted much time and energy to public education, drafting of legislation, and lobbying efforts aimed at securing the repeal of mandatory sterilization laws and educating physicians and other professionals as to the lack of scientific and medical justification for involuntary sterilization practices. By and large, the professional communities and public officials have become increasingly opposed to compulsory sterilization. And yet, these efforts by the proposed *amici*, medical and

scientific leaders, and state legislatures may come to nought if judges are granted the unilateral power to authorize sterilization in the absence of a statute so providing. The judicial conduct challenged in this action is of an extreme nature; it is an isolated example of a judicial act in which other judges have almost never engaged. But if no remedy is provided to the Respondent in this case and if the Petitioner is allowed to escape from liability for his acts, then there is a grave danger to handicapped people that such judicial conduct will be replicated. And, although it has been stymied by modern legislative efforts and scientific enlightenment, the specter of compulsory sterilization could thus rise again.

The technical issues of jurisdiction and judicial immunity dealt with in this case should be examined within the context of the serious dangers to fundamental personal rights of disabled citizens which are entailed by the factual situation from which the case arises. The proposed *amici* organizations hope to provide such a broader, substantive perspective to this Court.

Wherefore, the American Coalition of Citizens with Disabilities, the Epilepsy Foundation of America, the Counsel for Handicapped People, and the Developmental Disabilities Law Project respectfully pray this Court for permission to file the attached Brief Amici Curiae.

December 16, 1977

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INTEREST OF AMICI CURIAE

The interest of *amici curiae* is set out in the attached Motion for Leave to File Brief Amici Curiae, pp. xi - xv, *supra.*

SUMMARY OF ARGUMENT

There is no legal precedent, either historical or recent, for courts to possess an inherent authority to authorize sterilizations. Indeed, modern scientific, medical, and judicial disfavor of compulsory sterilization argues strongly against the existence of such authority. Sterilization is a drastic invasion of fundamental personal rights, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and the eugenics theories which were once thought to support involuntary sterilization have long since been disproven.

The power to order sterilization, if it can be justified in any circumstances, is certainly not justifiable in the absence of a specific statutory provision so authorizing. In this case, Petitioner had no statutory or common law authority to approve sterilization of Respondent. Moreover, because Petitioner did not cause notice of the petition for sterilization to be given to Respondent and did not give her any opportunity to appear or to be represented in the proceedings, Petitioner lacked jurisdiction over the person of Respondent.

It is of no avail for Petitioner to argue that every court has the jurisdiction to hear the question of its own jurisdiction, for Petitioner went far beyond the consideration of the extent of his own jurisdiction and proceeded to approve the sterilization of Respondent.

In addition, Petitioner acted in this case in the complete absence of any and all elements of procedural due process which are essential to the exercise of judicial jurisdiction. By acting in the absence of statutory authority, by failing to appoint a guardian ad litem, by failing to have

any notice given to Respondent, by failing to hold any hearing, by failing to file anything in court, and by failing to allow any appeal, Petitioner clearly removed this case from the scope of his jurisdiction.

While Respondent satisfies all the specific requirements for recovery of damages in actions under 42 U.S.C. §1983, she is faced with the doctrine of judicial immunity as a possible bar to her recovery, *Pierson v. Ray*, 386 U.S. 547 (1967). The doctrine of judicial immunity is, however, inapplicable in this case because Petitioner acted in clear absence of jurisdiction. Moreover, amici suggest that the justifications offered in *Pierson* for an absolute judicial immunity are not sound, and that a review of the common law doctrine of judicial immunity and an examination of the legislative history surrounding §1983 reveals that *Pierson* was wrongly decided.

The doctrine of absolute judicial immunity does not serve legitimate public interests. The justifications which are offered in support of the doctrine apply equally well to other state officials, and yet this Court has seen fit to abolish official immunity in those other contexts. It is also logically inapposite to continue to allow absolute judicial immunity to monetary damages while at the same time injunctions are permitted to be issued against state judicial officers.

For these reasons, the doctrine of absolute judicial immunity as a bar to damage actions under §1983 is not on a sound footing and should be abolished.

But even if this Court does not wish to go so far as to abolish absolute judicial immunity, the doctrine should

certainly not be applied in a situation like the present case where its application would prohibit the only possible remedy for the deprivation of Respondent's constitutional rights. Procreation and privacy are fundamental constitutional rights; Respondent suffered a denial of these rights because of Petitioner's acts. In the circumstances of this case, where Respondent learned of her sterilization only long after the fact, and no other appropriate remedies are available, an action for monetary damages under §1983 represents Respondent's only hope for vindication of her rights. In these circumstances, the doctrine of absolute judicial immunity should be attenuated to permit Respondent a remedy for the irreversible abrogation of her fundamental rights.

ARGUMENT

I.

THERE WAS CLEAR ABSENCE OF JURISDICTION FOR PETITIONER TO CONSIDER AND APPROVE THE PETITION FOR THE STERILIZATION OF RESPONDENT.

The requirement that courts must possess jurisdiction over matters in which they presume to take judicial action is a longstanding principle of American jurisprudence. In 1838, this Court, in setting out ground rules concerning the necessity of jurisdiction, said that whenever the question of jurisdiction arises:

> it must be considered and decided, before any court can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction. Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; the question is, whether on the case before a court, their action is judicial or extrajudicial; with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it.
>
> *Rhode Island v. Massachusetts*, 37 U.S. 657, 718 (1838).

It is a matter of almost equally venerable precedent that jurisdiction requires: (1) authority over the subject matter of

a proceeding; (2) authority over the parties; and (3) the power to take the action or render the judgment contemplated. *Cooper v. Reynolds*, 77 U.S. 308, 316 (1870). The Petitioner in this action acted in circumstances where there was a clear absence of each of these elements of jurisdiction.

A. Because Sterilization Is a Drastic Procedure Which Is Scientifically, Medically, and Judicially Disfavored, and Because Procreation Is a Fundamental Personal Right, Courts Have Never Been Deemed to Possess Inherent Jurisdiction to Approve Sterilizations.

> We are dealing here with . . . one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.
> *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

Because of such sentiments, compulsory sterilization has generally been viewed with disdain in American society. The courts in this country have cast a wary eye upon legislative enactments which seek to impose a permanent deprivation of the ability to procreate and have been quick to strike down forced sterilization practices which come into conflict with the constitutional rights of affected individuals. Thus, sterilization measures have been judicially invalidated as

violative of equal protection of the laws,[1] as denials of due process of law,[2] as "cruel and unusual punishment",[3] and even as "bills of attainder".[4] In light of the importance of the rights at stake and of the gravity to the individual of the irreversible intrusion of sterilization, it is not surprising that there is no legal precedent for judges to order sterilization simply by claiming that they possess the inherent power to do so.

There is no English common law precedent for an inherent authority of courts to order sterilization

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[1] *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Haynes v. Lapeer Circuit Judge*, 201 Mich. 138, 166 N.W. 938 (1918); *Smith v. Board of Examiners*, 85 N.J.L. 46, 88 A.963 (1913); *In re Thomson*, 103 Misc. 23, 169 N.Y.S. 638 (Sup. Ct.), aff'd sub nom. *Osborn v. Thomson*, 185 App. Div. 902, 171 N.Y.S. 1094 (1918).

[2] *In re Hendrickson*, 12 Wash. 2d 600, 123 P.2d 322 (1942); *Brewer v. Valk*, 204 N.C. 186, 167 S.E. 638 (1933); *In re Opinion of the Justices*, 230 Ala. 543, 162 So. 123 (1935); *Williams v. Smith*, 190 Ind. 526, 131 N.E. 2 (1921); *Davis v. Berry*, 216 F. 413, 418 (S.D. Iowa 1914).

[3] *Davis v. Berry*, 216 F. 413, 416-417 (S.D. Iowa 1914); *Mickle v. Henrichs*, 262 F. 687 (D. Nev. 1918).

[4] *Davis v. Berry*, 216 F. 413, 419 (S.D. Iowa 1914). The cases discussed in nn. 1-4 should be contrasted with *Buck v. Bell*, 274 U.S. 200 (1927), discussed below at pp. 13-16 *see generally*, R. Burgdorf and M.P. Burgdorf, *"The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons,"* 50 Temp. L.Q. 995 (1977).

procedures.[5] Indeed, it was not until the end of the nineteenth century that a practical and effective surgical method for producing sexual sterility was devised.[6] The development of tubal ligation and vasectomy operations around the turn of the century occurred at about the same time as a "eugenics scare" began to gain momentum in America.[7] Proponents of eugenics theories preached that our society was threatened by race degeneration through the spread of hereditary defects and advocated the scientific control of human heredity.[8] In the wake of such propaganda, a number of states passed compulsory eugenic

[5] *See*, Note, *Courts – Scope of Authority – Sterilization of Mental Defectives*, 61 Mich. L. Rev. 1359, 1360-1361 (1963). The British common law principles in regard to jurisdiction over incompetent persons were summed up in *Beall v. Smith*, L.R. 9 Ch. 85 (1873): "It is to be borne in mind that unsoundness of mind gives the Court of Chancery no jurisdiction whatsoever. The Court of Chancery is not the curator either of the person or the estate of a person *non compos mentis* whom it does not and cannot make its ward."

[6] *See*, Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 Cal. L. Rev. 917, 920 (1974); O'Hara and Sanks, *Eugenic Sterilization*, 45 Geo. L.J. 20 (1956).

[7] *See*, Vukowich, *The Dawning of the Brave New World – Legal, Ethical, and Social Issues of Eugenics*, 1971 U. Ill. L. Forum 189 (1971); Bligh, *Sterilization and Mental Retardation*, 51 A.B.A.J. 1059 (1965).

[8] *Ibid.; see also*, Kindregan, *Sixty Years of Compulsory Eugenic Sterilization: 'Three Generations of Imbeciles' and the Constitution of the United States*, 43 Chicago-Kent L. Rev. 123 (1966); Wolfensberger, *The Origin and Nature of our Institutional Models* 33-39 (1975).

sterilization statutes.[9] Ironically, the nation's first such law was passed in 1907 in Indiana, the state in which the present controversy arose.[10] This Indiana statute was found to be unconstitutional by the Indiana Supreme Court in 1921,[11] was replaced by a redrafted statute, and was finally repealed in 1974.[12]

The eugenics movement was in vogue for a relatively short period of time. From the early 1930's onward, modern scientific studies began to challenge and undermine the eugenicists' theories.[13] It became increasingly apparent that the laws of heredity developed by Mendel in his

[9] O'Hara and Sanks, *Eugenic Sterilization*, 45 Geo L.J. 20, 22 (1956).

[10] Ind. Acts. 1907, c. 215.

[11] *Williams v. Smith*, 190 Ind. 526, 131 N.E. 2 (1921).

[12] 1971 Indiana Code 16-13-13-1 through 16-13-13-4; *A.L. v. G.R.H.*, 325 N.E. 2d 501, 502 n.1 (Ind. App. 1975), cert. den. 425 U.S. 936 (1976).

[13] In 1936, the American Neurological Association issued a report which criticized the overwhelming emphasis being given to heredity as a cause of mental retardation, mental illness, epilepsy, pauperism, and other disabilities. The report concluded that environmental factors were at least as potent as genetic factors in causing these handicaps and that there was no evidence of any increase in such conditions or of any biological deterioration of the human race, and asserted that under the present state of knowledge concerning heredity, no compulsory sterilization programs were justified. Committee of the American Neurological Association, Eugenical Sterilization (1936), discussed in Ferster, *Eliminating the Unfit–Is Sterilization the Answer?*, 27 Ohio St. L.J. 591, 602-603 (1966).

experimentation with peas cannot be applied *carte blanche* in the context of human characteristics.[14] Contrary to the beliefs of eugenics zealots, two mentally retarded parents often bear childen of normal intelligence. Conversely, it has been estimated that 89 percent of all mentally retarded children come from "normal" parentage.[15] Theories that epilepsy, insanity, and other traits are hereditary were likewise refuted by modern scientific evidence.[16]

As the eugenics movement has waned, so has the prevalence of and the justification for non-consensual

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Footnote [13] (Continued)

In 1937, the American Medical Association declared: "Our present knowledge regarding human heredity is so limited that there appears to be very little scientific basis to justify limitation of conception for eugenic reasons." Committee to Study Contraceptive Practices and Related Problems, *American Medical Association Proceedings*, 54 (May, 1937), quoted in Ferster, *id.*, at 603.

[14] *See*, Note, *Human Sterilization*, 35 Ia. L. Rev. 251, 254 (1950).

[15] *Ibid.*; Kindregan, *Sixty Years of Compulsory Eugenic Sterilization: 'Three Generations of Imbeciles' and the Constitution of the United States*, 43 Chicago-Kent L. Rev. 123, 139 (1966). One study of two institutions for mentally retarded children found that 15 percent of the children were born of parents one or both of whom were retarded, i.e., 85 percent were born of "normal" parents, Gamble, *What Proportion of Mental Deficiency is Preventable by Sterilization?*, 57 *Am J. Mental Defic.* 123, 124 (1952), discussed in Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 Cal. L. Rev. 917, 926 N.56 (1974).

[16] *See*, Note *Human Sterilization*, 35 Ia. L. Rev. 251, 254 (1950).

sterilizations. The number of states having compulsory sterilization laws has been decreasing, and even in states where there is such a law the number of sterilization operations actually performed has been dropping.[17]

Physicians and other professionals have become skeptical of the benefits to be derived from compulsory sterilization. The current medical outlook was recently summed up in the findings of a three-judge federal court which examined a North Carolina statute dealing with the sterilization of mentally retarded people:

> We think it a fair statement, from the expert testimony we have heard and read, to say that the best opinion presently is that rarely would a competent doctor recommend involuntary sterilization – but that he might do so in an extreme case. As a corollary to that proposition, it is also fair to say, we think, that prevalent medical opinion views with distaste even voluntary sterilization for the mentally retarded and is inclined to sanction it only as a last resort and in relatively extreme cases. In short, the medical and genetical experts are no longer sold on sterilization to benefit either retarded patients or the future of the Republic.
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> *N.C. Ass'n. for Retarded Children v. State of N.C.*, 420 F. Supp. 451, 454 (M.D.N.C. 1976).[18]

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[17] Ferster, *Eliminating the Unfit–Is Sterilization the Answer?*, 27 Ohio St. L.J. 591, 613, 619 (1966).

[18] The court went on to observe: "Between June 1970 and April, 1974, 23 sterilizations were performed upon residents of North Carolina's mental retardation centers pursuant to the provision of the preceding statute. Viewed over a longer time span, there has been a diminishing frequency in use of the sterilization procedure, reflecting, we think, diminishing confidence of medical doctors in its efficacy for any purpose except to prevent conception. That will do." *Id.* at 454.

This professional disfavor of unconsented sterilization was highlighted in 1974 when the American Association on Mental Deficiency, an organization of professionals, many of whom are employed in public facilities for mentally retarded persons, issued an official policy statement which declared: "The American Association on Mental Deficiency strongly opposes the enactment and application of statutes that permit involuntary sterilization."[19]

Therefore, not only is there no historical precedent for a court to have an inherent power to order sterilization, but the judicial, scientific, and medical antipathy toward compulsory sterilization make it clear that there is no legitimate rationale for a judge to invent such a power. At a time in history when legislatures, physicians, and scientists agree that compulsory sterilization is not justifiable, a judge has no authority unilaterally to conjure up the power to deprive a citizen of the right to procreate, "one of the basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). *See also, San Antonio School District v. Rodriquez*, 411 U.S. 1, 34 n. 76 (1973).

B. Jurisdiction To Order Sterilization Can Exist, If At All, Only Pursuant to Specific Statutory Authorization.

This Court has had two previous opportunities to examine the legal validity of compulsory sterilization. In the most recent of these cases, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the right to procreate was specifically declared to

[19] Sterilization of Persons who are Mentally Retarded, an official statement of the American Association on Mental Deficiency, approved by the AAMD Executive Committee March 8, 1974, Guideline IIIA.

be a fundamental constitutional right. *Id.* at 541. *Skinner* involved a challenge to a statute authorizing the involuntary sterilization of "habitual criminals," a category which included convicted larcenists but not embezzlers – a nearly indistinguishable class of criminals. In striking the statute down as a violation of equal protection, the Court held that sterilization statutes are to be subjected to strict judicial scrutiny:

> [S]trict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.
> *Id.* at 514.

Under this strict scrutiny standard, a statutory classification will be unconstitutional unless a compelling governmental interest can be demonstrated. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

The other Supreme Court decision dealing with sterilization occurred in 1927 when, at the height of a "eugenics scare" which gripped the United States and some other countries, a compulsory sterilization statute was upheld in *Buck v. Bell*, 274 U.S. 200 (1927). In the ensuing fifty years, most of the scientific and legal basis of *Buck v. Bell* have been discredited.[20] The eugenic and racial purification

[20] *See generally*, R. Burgdorf and M.P. Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 Temp. L.Q. 995 (1977).

theories which gave rise to the decision have long been discarded.[21] It is generally agreed that the phrase "Three generations of imbeciles are enough," *id.* at 207, upon which Justice Holmes based his reasoning in writing the opinion of the Court, was a serious misinterpretation of the facts of the case. Neither the mother of Carrie Buck nor Carrie's daughter were "imbeciles." In fact, the latter turned out to be very bright.[22]

In *N.C. Ass'n for Retarded Children v. State of N.C.*, 420 F. Supp. 451 (M.D.N.C. 1976) the court found that, "Most competent geneticists now reject Social Darwinism and doubt the premise implicit in Mr. Justice Holmes' incantation . . . " *Id.* at 454.

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[21] *See*, nn. 13-16, *supra*, and accompanying text. The collapse of the scientific foundation of the *Buck v. Bell* analysis has been aptly summarized: "In the . . . decades since *Buck v. Bell* was handed down, concepts of heredity that gave the eugenic sterilization laws much of their substance have been eroded by the further development of science. Examination of the present state of science discloses little ground indeed for the eugenic sterilization laws to rest upon." Note, *The Individual and the Involuntary Sterilization Laws*, 1966, 31 Albany L. Rev. 97, 102 (1967).

[22] *See, e.g.*, Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 Cal. L. Rev. 917, 921 (1974); O'Hara and Sanks, *Eugenic Sterilization*, 45 Geo. L.J. 20, 31-32 (1956); Kindregan, *Sixty Years of Compulsory Eugenic Sterilization: 'Three Generations of Imbeciles' and the Constitution of the United States*, 43 Chicago-Kent L. Rev. 123, 133, n.52 (1966).

The analysis employed by the Court in *Buck v. Bell* is also subject to question because it involved only a rational basis standard of review of the challenged sterilization statute. Subsequent rulings, such as *Skinner v. Oklahoma*, 316 U.S. 535 (1942) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), have made it clear that procreation is a fundamental right and that measures which seek to deny that right must be subjected to compelling state interest scrutiny. The apparent inconsistencies of the holdings in *Buck* and in *Skinner* suggest that the reasoning in *Buck* may well be anachronistic today.[23]

For these and other reasons, Justice Holmes' opinion in *Buck v. Bell* has been widely and severely criticized.[24] Some commentators have speculated that this Court would reverse its holding if again asked to rule on a eugenic sterilization law.[25]

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[23] *See*, Murdock, *Sterilization of the Retarded: A Problem or a Solution?*, 62 Cal. L. Rev. 917, 921-922 (1974).

[24] *E.g.* R. Burgdorf and M.P. Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 Temp. L.Q. 995 (1977); Gest, *Eugenic Sterilization: Justice Holmes v. Natural Law*, 23 Temp. L.Q. 306 (1950); O'Hara and Sanks, *Eugenic Sterilization*, 45 Geo. L.J. 20, 29-32 (1956); Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 Ohio St. L.J. 591, 617 (1966); Kindregan, *Sixty Years of Compulsory Eugenic Sterilization: 'Three Generations of Imbeciles'* and the *Constitution of the United States*, 43 Chicago-Kent L. Rev. 123, 134-135, 143 (1966).

[25] *E.g.*, Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 Ohio St. L.J. 591, 596, n.29 (1966) and the authorities cited therein.

But whatever the shortcomings and current viability of *Buck v. Bell*, 274 U.S. 200 (1927), it is clear that neither in it, in *Skinner*, nor in any other case, has this Court ever indicated that compulsory sterilization could be imposed in the absence of a specific statutory provision. While there may be unsettled questions concerning the authority of states to prescribe sterilizations by statute, there is not and never has been any question that states can mandate sterilization in the absence of a statute. Indeed, if governmental bodies could deprive individuals of rights as important as procreation without any legislative enactment so authorizing, basic concepts of individual rights, democracy, and due process of law would be meaningless.

Lower courts have made it clear that there can be no jurisdiction to order sterilization of minors or mentally incompetent persons in the absence of a specific statutory provision: *Frazier v. Levi*, 440 S.W. 2d 393 (Tex. Civ. App. 1969) (no jurisdiction for county probate court having general jurisdiction to approve sterilization of mentally retarded woman); *In re Guardianship of Kemp*, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974) (probate court with exclusive jurisdiction in guardianship matters did not have jurisdiction to order sterilization of adult mentally defective woman); *Holmes v. Powers*, 439 S.W. 2d 579 (Ky. 1968) (courts of Kentucky had no authority to grant permission for sterilization of mentally retarded woman); *In re M.K.R.*, 515 S.W. 2d 467 (Mo. 1974) (juvenile division of circuit court did not have jurisdiction to authorize sterilization of a 13 year old mentally retarded girl); *In re Lambert*, No. 61156 (Probate Ct. Davidson Cty. Tenn., filed Mar. 4, 1976) (probate court lacked jurisdiction to approve sterilization of 18 year old mentally deficient woman); *Wade v. Bethesda Hospital*, 337 F. Supp. 671 (S.D. Ohio 1971), *motion den.*

356 F. Supp. 380 (S.D. Ohio 1973) (probate judge who ordered sterilization of mentally retarded woman acted in the total absence of jurisdiction). In the words of the *In re M.K.R.* court, the awesome power to "irreversibly deny to a human being a fundamental right, the right to bear or beget a child * * * may be conferred only by specific statute," 515 S.W. 2d at 470-471.

As the Court of Appeals for the Seventh Circuit indicated in the present case:

> Although courts ought not to be discouraged from creating innovative legal remedies to meet changing social conditions, they may not use the power to create new decisional law to order extreme and irreversible remedies such as sterilization in situations where the legislative branch of government has indicated that they are inappropriate. If we were to say that jurisdiction existed to order sterilization without adherence to the requirements of institutionalization and procedural due process mandated by the Indiana legislature, we would be sanctioning tyranny from the bench. *Sparkman v. McFarlin*, 552 F.2d 172, 176 (7th Cir. 1977)

C. Petitioner Had No Statutory or Common Law Basis For His Approval of the Sterilization of Respondent.

> If the law confers the power to render a judgment or decree, then the court has jurisdiction . . . *Rhode Island v. Massachusetts*, 37 U.S. 657, 718 (1838).

In the instant case, the Seventh Circuit Court of Appeals observed:

> In approving the Petition, Judge Stump cited no statutory or common law authority under which he was purporting to act. Moreover, counsel has not during the course of this litigation cited any specific

> statutory or common law basis under which a court can order the sterilization of a child simply upon the petition of a parent. 552 F.2d at 174.

There is, as was noted above,[26] no basis in English common law for the authorization of sterilization operations by a court. Nor have the American cases which have examined the issue of sterilization found any common law authority permitting a court to order a compulsory sterilization: *Frazier v. Levi,* 440 S.W. 2d 393 (Tex. Civ. App. 1969); *In re Guardianship of Kemp,* 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974); *Holmes v. Powers,* 439 S.W. 2d 579 (Ky. 1968); *In re M.K.R.,* 515 S.W. 2d 467 (Mo. 1974); *In re Lambert,* No. 61156 (Probate Ct. Davidson Cty., Tenn., filed Mar. 4, 1976); *Wade v. Bethesda Hospital,* 337 F. Supp. 671 (S.D. Ohio 1971).

The only Indiana statute dealing with sterilization was contained in Burns Ind. Stats. Ann. §§16-13-13-1 through 16-13-13-4 (1971) (these sections have since been repealed). Those provisions concerned patients of state mental health facilities and institutions, and mandated specific due process procedural safeguards to be followed before sterilizations could be performed upon such persons. That statute clearly has no application to the present case as Respondent is not and never has been institutionalized, nor have any of the statutorily authorized procedural prerequisites been met. Actually, the existence of such a statute undercuts any argument that Petitioner possessed implied or inherent authority to authorize sterilizations, as it indicates clearly that in circumstances where the Indiana legislature wished to allow sterilizations it enacted a specific statute so providing. As the Indiana courts have observed:

> When the law is affirmative that a thing should be done by certain persons or in a certain manner, this

[26] *See* n.5, *supra.*

> affirmative matter contains a negative that it shall not be done by other persons or in another manner. *State ex rel. Bingham v. Home Brewing Co. of Indianapolis,* 183 Ind. 75, 105 N.E. 909, 916 (1914).

Petitioner points to Burns Ind. Stats. Ann. §33-4-4-3 (1971), which confers upon the circuit courts original jurisdiction "in all cases in law and in equity whatsoever . . . " and suggests that this is the source of his power to authorize sterilizations. Petitioner's interpretation of this section would lead one to believe that circuit judges have unlimited power to do anything and everything they wish without any legal or precedential restraints – the very type of "tyranny from the bench," 552 F.2d 172, 176, which concerned the Seventh Circuit in this action. Actually, of course, Indiana courts, like all courts, have limits to their jurisdiction. *See, e.g., State v. Libbert,* 96 Ind. App. 84, 177 N.E. 873 (1931), *rehearing denied,* 96 Ind. App. 84, 180 N.E. 757 (1932), where the Indiana Appellate Court, sitting *en banc*, held that a judge who committed a criminal defendant to jail after the expiration of a suspended sentence acted with a total lack of jurisdiction and could be liable in civil damages.

As this Court has ruled:

> All courts, even the highest, are more or less limited in their jurisdiction: they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to the transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments . . . Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of

> procedure, and in the extent and character of its judgments. It must act judicially in all things and cannot transcend the power conferred by law. *Windsor v. McVeigh*, 93 U.S. 274, 282 (1876).

In *Wade v. Bethesda Hospital*, 337 F. Supp. 671 (S.D. Ohio 1971), a case which arose from a factual situation very similar to the case at bar, an Ohio probate judge was sued for monetary damages arising out of his order that a mentally retarded woman should be sterilized. In support of his contention that his actions should be cloaked with judicial immunity, he relied upon the statute conferring general jurisdiction upon probate courts, which declared: "The probate court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute." *Id.* at 673.

The federal district court rejected the contention that this general jurisdictional provision provided a basis for a sterilization order and held that the probate judge had "acted wholly without jurisdiction in this matter." *Id.* at 674. The court observed further:

> There is no statute in Ohio which authorizes a judge to order sterilization for any purpose. Nor has this Court been able to discover any judicial precedent for such an order in the absence of a specific statute . . .
>
> Indeed, in the only case where an appellate court has considered the possibility of sterilization in the absence of specific statutory authorization, the court affirmed the lower court judgment which concluded that sterilization was not within the general equity power of the court and that it was a

> matter to be dealt with by the legislature. *Holmes v. Powers*, Civ. No. 4151 (Cir. Ct. Whitley Cty., Ky. 1968), *aff'd* 439 S.W. 2d 579 (Ct. App. Ky., 1968). *Id.* at 673-674.

As an alternative source of jurisdiction to authorize sterilizations Petitioner relies upon Burns Ind. Stats. Ann. §§16-8-3-1 and 16-8-4-2 (1971), which permit parents to give consent to medical treatment for minors and legally incompetent persons. Petitioner's logic is difficult to follow because the cited statutory sections describe a power which is possessed by parents, and say nothing about the jurisdiction of any court. It is doubtful that a legislative provision conferring authority on private citizens can somehow expand the jurisdiction of a court beyond its otherwise statutorily assigned boundaries. Moreover, if parents possessed the authority to have their children sterilized, then there would be no need or rationale for expanding the circuit court's jurisdiction to include sterilizations. Such a parental right could simply be exercised by the parent, without judicial involvement.

Even assuming, however, that parents can somehow bestow some of their parental authority to provide jurisdiction to the circuit courts of Indiana, such an assertion is still of no avail to Petitioner because the law is clear, in Indiana and elsewhere, that the parental authority to consent to medical treatment does not include the power to have the child sterilized. The parent cannot give to the court that which the parent does not have. Various courts have indicated that, while parental authority is great, it does not extend to the irreversible deprivation of the fundamental right of procreation by sterilization: *In re Lambert*, No. 61156 (Probate Ct. Davisson Cty. Tenn., filed March 4, 1976)

(mother seeking authority to consent to sterilization); *In re M.K.R.*, 515 S.W. 2d 467 (Mo. 1974) (mother seeking court authorization of sterilization); *In re Guardianship of Kemp*, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974) (sterilization requested by father); *Frazier v. Levi*, 440 S.W. 2d 393 (Tex. Civ. App. 1969) (application for sterilization filed by mother).

In Indiana, this issue was decided definitively in *A.L. v. G.R.H.*, 325 N.E. 2d 501 (Ind. App. 1975), *hearing denied* May 29, 1975, *cert. den.* 425 U.S. 936 (1976) in which the Indiana Court of Appeals held that parents did not possess the legal authority to consent to the sterilization of their child, "We believe the common law does not invest parents with such power over their children even though they sincerely believe the child's adulthood would benefit therefrom." *Id.* at 502.

Moreover, this Court has never indicated that parental authority is unlimited:

> Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.
> *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944).

In *Wisconsin v. Yoder*, 406 U.S. 205 (1971), this Court, in considering the rights of parents to direct the religious upbringing of their children, observed:

> To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.
> *Id.* at 233-234.[27]

Nor has this Court permitted parents to interfere with their minor daughter's decision whether or not to have an abortion, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

> Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.
> *Id.* at 74.

Consistent with these principles, therefore, the general authority of parents over children, including the power to consent to medical treatment needed by the child, does not give a parent the legal authority to compel a child to undergo the drastic invasion of personal rights and permanent denial of the ability to procreate which characterize sterilization.

D. Petitioner Clearly Lacked Jurisdiction Over the Person of Respondent.

In addition to lacking jurisdiction over the subject matter of sterilization, Petitioner acted in the clear absence of jurisdiction over the person of Respondent. It is axiomatic

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[27] Such limitation upon parental authority underlies our child neglect and child abuse laws and compulsory school attendance laws. A number of courts have held that parents do not have the right to refuse lifesaving medical services for their children. *e.g.*, *Wallace v. Labrenz*, 411 Ill. 618, 104 N.E. 2d 769 (1952); *Morrison v. State*, 252 S.W. 2d 97 (K.C. App. 1952); *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962); *In re Clark*, 21 Oh. Op. 2d 86, 185 N.E. 2d 128 (1962). "No longer can parents virtually exercise the power of life or death over their children," *In re Clark*, 21 Oh. Op. 2d 86, 185 N.E. 2d 128, 131 (1962).

that courts must possess *in personam* jurisdiction over the parties involved in a legal proceeding.

> The consistent constitutional rule has been that a court has no power to adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. *E.g., Pennoyer v. Neff*, 95 U.S. 714 (1878); *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957).
> *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 110 (1969).

In *Harris v. Hardeman*, 55 U.S. 334 (1852), the Court declared:

> [J]udicial proceedings against a person not served with process to appear, and not being within the jurisdiction of the court, and not appearing in person or by attorney, are null and void.
> *Id.* at 339-340.

The methods for obtaining jurisdiction over the person are equally well-established: "Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause," *Cooper v. Reynolds*, 77 U.S. 308, 316-317 (1870). *See also, Robertson v. Labor Board*, 268 U.S. 619, 622 (1925); *Kendall v. United States*, 37 U.S. 524, 623 (1838).

In the present case, no notice was given to Respondent of the petition filed to have her sterilized, nor did she appear during the pendency of the action either in person or through counsel. *Sparkman v. McFarlin*, 552 F.2d 172, 173 (7th Cir. 1977). Indeed, she did not even learn that there had been such a proceeding and that she had been sterilized until four years had passed. *Id.* at 173. It is apparent, therefore, that the court never obtained jurisdiction over the person of Respondent, nor took any steps to do so.

In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), this Court held that a girl, although a minor, was mature enough to become pregnant and thus was

mature enough to be entitled to make the decision whether or not to have an abortion. Likewise, in the present action, the Petitioner, who was mature enough to become pregnant, was at least entitled to be made aware of and to be involved in the decision to deprive her permanently of her procreative function.

E. Petitioner Had Jurisdiction to Hear the Question of Jurisdiction, But No Jurisdiction to Consider and Approve the Petition.

Petitioner argues that "each court has jurisdiction to determine its own jurisdiction" (Petitioner's Br. p. 15). If this statement means that a court has the power, and indeed the duty, to consider whether or not is has jurisdiction over each of the matters which come before it, then it is indisputable. It does not follow, however, that because a court has jurisdiction to consider the question of jurisdiction, it has jurisdiction to decide the merits of every matter brought before it. In the present action, the Petitioner did not merely determine its own jurisdiction, but, on the contrary, completely ignored the absence of jurisdiction and issued a judicial document which permanently deprived Respondent of her fundamental right to procreate.

In addition to jurisdiction over the subject matter and the parties, it is necessary for a court to have jurisdiction to render the remedy or judgment which it assumes to render. *Cooper v. Reynolds*, 77 U.S. 308, 316 (1870). In *Windsor v. McVeigh*, 93 U.S. 274 (1876), the Court declared:

> Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the

> subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will . . . The judgments mentioned, given in the cases supposed, would not be merely erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases.
> *Id.* at 282.

The boundaries of a court's authority in fashioning remedies and rendering judgments is determined by the extent of authority it is given by law in regard to a particular type of case.

> The power to render the decree or judgment which the court may undertake to make in the particular cause, depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause.
> *Cooper v. Reynolds*, 77 U.S. 308, 317 (1870).

In the instant case, while Petitioner may have had authority to examine the question of his own jurisdiction, he had no legal authority to consider and approve the petition for the sterilization of Respondent. In approving the sterilization, Petitioner went beyond his judicial authority and engaged in an action for which he lacked any jurisdiction.

F. Jurisdiction of a Court Cannot be Exercised in Total Absence of Due Process of Law.

Windsor v. McVeigh, 93 U.S. 274 (1876), involved a confiscation of land proceeding in the United States District Court for the Eastern District of Virginia. The District Court judge refused to allow the owner of the property to appear by counsel at the trial of the matter because the owner was loyal to the Confederate cause, and his land was subsequently confiscated. The Supreme Court held the proceedings to be a nullity because the District Court lacked jurisdiction:

> Jurisdiction is the right to hear and determine; not to determine without hearing. And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard, and therefore, could be no exercise of jurisdiction. By the act of the court, the respondent was excluded from its jurisdiction.
> *Id.* at 283-284.

In the present case, where the rights at stake were much more important than mere ownership of land, Petitioner denied Respondent any semblance of notice, opportunity to be heard, or any other basic due process rights.

Petitioner approved the sterilization petition without any notice to Respondent or anyone else on her behalf, without any filing in court, without any hearing, without a guardian *ad litem* appointed to represent the young woman's interests, and without any opportunity to appeal the decision to have her sterilized. A more complete denial of the fundamentals of due process can hardly be imagined.

> The "right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle

> basic to our society." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J. concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976).

Petitioner's failure to require that notice of the proceeding be given to Respondent and his failure to conduct a hearing where she could respond to the petition constitute such a significant deviation from accepted standards of due process that they place the case clearly outside Petitioner's judicial jurisdiction.

Moreover, the failure to conduct a hearing deprived Petitioner of knowledge of a number of crucial facts. Among the critical matters upon which the Petitioner did not hear any testimony, evidence, or arguments were:

1. Whether Respondent was mentally retarded or not.

Respondent's mother alleged that she was "somewhat retarded," but this contention was contradicted by the fact that she had succeeded in passing in public school classes along with other children her age. 552 F.2d at 173. No testing, evaluations, or other evidence was submitted to support the bare assertion that Petitioner was "somewhat retarded." There is nothing to indicate that Petitioner's mother is a psychologist or other professional qualified to assess intelligence or even that she is qualified to understand what the scientific term "mental retardation" means. Imposition of the label "mentally retarded" is significant enough that an opportunity to be heard is required before it

is applied. *See Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 343 F. Supp. 279, 295 (E.D. Pa. 1972). Moreover, if Respondent were found to be mentally retarded, evidence of the degree of mental retardation would be necessary to indicate the extent of her handicap and her functional ability.

2. Whether Respondent was likely to conceive a child.

The Petition contained an allegation by the mother that she was unable to "prevent unfortunate circumstances." 552 F.2d at 173. Yet no evidence was heard to substantiate the mother's implication that Respondent was engaging in sexual intercourse and was likely to become pregnant. An opportunity to be heard is constitutionally mandated before a person can be publicly labeled an excessive drinker. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). Surely, an opportunity to be heard is equally necessary before one can be labeled a promiscuous person. "Where a person's good name, reputation, honor, or integrity is at stake . . . notice and an opportunity to be heard are essential." *Id.* at 437. Yet Respondent was given no opportunity to refute the implications that she was engaging in sexual relations. In addition, even if Respondent had been found to be sexually active, there was no evidence that she was unwilling or unable to use contraceptive devices or other methods for avoiding pregnancy. In short, there was no hearing upon the essential fact of whether Respondent was actually likely to give birth to a child.

3. Whether there was a compelling governmental interest justifying the sterilization of Respondent.

It is well established that a citizen cannot constitutionally be deprived of a fundamental right such as

procreation unless such deprivation can be shown to be necessitated by a compelling governmental interest. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). *See also, San Antonio School District v. Rodriguez*, 411 U.S. 1, 34 n. 76 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972). In the present case there was no hearing upon the question of whether such a compelling governmental interest for the sterilization of Respondent existed, and no suggestion of any governmental interest whatsoever which would be furthered by the sterilization.

4. The likelihood of children of Respondent having any hereditary defect.

One supposed justification for efforts to obtain compulsory sterilization of mentally retarded people is to prevent the birth of genetically defective children. However, even eugenics advocates admit that a mentally retarded parent has an 88 percent chance of having a "normal" child.[28] If, therefore, the Respondent had been found to be mentally retarded, it would have been important to determine the causation of her retardation and to determine whether her disability was hereditarily transmissible. Petitioner, however, did not hear any evidence in regard to these issues.

5. Whether there were less drastic alternatives to sterilization.

In *Shelton v. Tucker*, 364 U.S. 479 (1960), this Court declared:

> In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal

[28] Reed, *Mental Retardation and Fertility*, 18 Supp. Social Biology 542 (1971).

> liberties when the end can be more narrowly achieved. The breadth of the legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.
> *Id.* at 488.

Petitioner did not investigate or hear any evidence as to whether less drastic means, such as contraceptive devices and medications, would have equally well served the objective of preventing Respondent from becoming pregnant, without the grievous consequence of irreversible sterilization.

Petitioner did not bother to hear one scintilla of evidence concerning these or other issues raised by the petition for sterilization. In failing to do so, Petitioner deprived himself from any jurisdictional basis for his approval of the petition. "For jurisdiction is the right to hear and determine; not to determine without hearing." *Windsor v. McVeigh*, 93 U.S. 274, 283-284 (1876).

II.

THE ASSERTED BASIS FOR THE CREATION OF THE DOCTRINE OF ABSOLUTE JUDICIAL IMMUNITY IS UNSOUND AND UNSUPPORTABLE AND THE DOCTRINE SHOULD BE ABOLISHED.

42 U.S.C. §1983, the first section of the Civil Rights Act of 1871, states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by

the Constitution and law, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

A. Respondent Satisfies All Requirements for Recovery Under §1983.

Judicial officers are proper defendants in §1983 actions. *Neal v. Brim*, 506 F.2d 6 (5th Cir. 1975); *Erdmann v. Stevens*, 458 F.2d 1205 (2d Cir. 1972); *Wade v. Bethesda Hosp.*, 337 F. Supp. 671 (S.D. Ohio 1971); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117 (S.D. N.Y. 1969) *aff'd on other grounds* 401 U.S. 154 (1971). The fact that Petitioner actually acted beyond the scope of his jurisdiction is immaterial in relation to the applicability of §1983; conduct engaged in by a state official even in the purported exercise of authority conferred by the state is action under color of law. The term "under color of law" includes acts of an official who can show no authority for what he does, *Basista v. Weir*, 340 F.2d 74 (3rd Cir. 1965); "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken 'under color of' state law." *Monroe v. Pape*, 365 U.S. 167, 184 (1961) quoting *United States v. Classic*, 313 U.S. 299, 326 (1941). By virtue of the acts of Petitioner, Respondent has suffered deprivation of rights protected by the Constitution. *See* section IIIA, *infra*. The fundamental right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 34 n. 76 (1973) and the right to bear and beget children, *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965), have long been recognized

in this Court. Finally §1983 clearly contemplates money damage liability. *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974); *Wade v. Bethesda Hosp.*, 337 F. Supp. 671 (S.D. Ohio 1971). Thus, Petitioner is a state official who, while acting under color of law, deprived Respondent of a right secured by the Constitution for which an action at law is a proper remedy.

Although Respondent satisfies all prerequisites for recovery, she must still face Petitioner's contention that under the doctrine created in *Pierson v. Ray*, 386 U.S. 547 (1967) he is absolutely immune from money damage liability if he acted within the scope of his jurisdiction. Judicial immunity is inapplicable "where there is clearly no jurisdiction over the subject matter," *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351-352 (1872); *accord Pierson v. Ray*, 386 U.S. 547, 554 (1967), or when the judge acts in a purely ministerial, not discretionary, fashion, *Ex parte Virginia*, 100 U.S. 339, 348 (1879). We have asserted in Section I, *supra*, that Petitioner acted in clear absence of jurisdiction, and thus the constraints of *Pierson* have no viability in this case. Amici suggest further that *Pierson v. Ray*, 386 U.S. 547 (1967) was wrongly decided and that the doctrine of absolute judicial immunity should be abolished. There is no constitutional bar to the abrogation of judicial immunity. The doctrine "has in large part been of judicial making." *Barr v. Matteo*, 360 U.S. 564, 569 (1959); *accord Doe v. McMillan*, 412 U.S. 306, 318-319 (1973). The decision to abolish or attenuate the doctrine "is solely a question of statutory interpretation." *Pierson v. Ray*, 386 U.S. 547, 565 (Douglas, J., dissenting).

B. The Justifications Relied Upon to Create Absolute Judicial Immunity are Not Supported Within the Common Law or Legislative History of §1983.

Chief Justice Warren's rationale in *Pierson v. Ray*, 386 U.S. 547 (1967), for holding judges immune from liability in damages for judicial acts challenged under §1983, was two-pronged: (1) The doctrine of absolute immunity was incontrovertibly "established at common law;" *id.*, at 554; (2) [T]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." *Id.* However, while the Chief Justice's opinion for the Court recognized that the doctrine of judicial immunity is entirely judge-made, he failed to assess accurately both its common law background and the legislative history of §1983, *Pierson v. Ray*, 386 U.S. 547 (Douglas, J. dissenting); Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 Nw. U. L. Rev. 615, 617-623 (1970); Note, *Immunity of Federal and State Judges from Civil Suit – Time for a Qualified Immunity?*, 27 Case West. Res. L. Rev. 727, 727-740 (1977); Note, *Liability of Judicial Officers Under Section 1983*, 79 Yale L.J. 322, 323-328 (1969).

1. Common Law

While some form of judicial immunity has a long history, *see Floyd v. Barker's Case*, 77 Eng. Rep. 1305 (Star Chamber 1608), that history is somewhat uneven. Originally, English law permitted civil suits against judges in actions complaining of false judgments, 2 F. Pollock & F. Maitland, *The History of English Law* 664-668 (2d ed. 1898). Later, when English common law created absolute immunity from tort liability, it applied only to judges of superior courts. The

Justices Protection Act, 11 & 12 Vict. c. 44 (1848); *see, Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 536 (1868). In this country, "absolute immunity from tort actions did not fully develop until the 1870's." Note, *Immunity of Federal and State Judges from Civil Suit – Time for Qualified Immunity?*, 27 Case West. Res. L. Rev. 727, 731 (1977). In a survey of 19th century case law in 14 randomly selected eastern and midwestern states, it was found that "in nine states the prevailing rule was absolute immunity, in four states immunity depended upon the judge's good faith, and in one state the law was inconclusive." *Id.* A more extensive survey revealed that "by 1871, thirteen states had adopted the absolute immunity rule; six states ruled that judges were liable if they acted maliciously, in nine states, courts had faced the issue but had not ruled clearly one way or the other; and nine states had apparently not faced the issue." Note, *Liability of Judicial Officers Under Section 1983*, 79 Yale L.J. 322, 326-327 (1969).

When, in 1868, the Supreme Court considered the issue for the first time, it declared that judges "are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless perhaps where the acts, in excess of jurisdiction are done maliciously or corruptly." *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 536 (1868). Thus, the Congress of the United States when it began its deliberations on H.R. 320, a bill to enforce the provisions of the fourteenth amendment, section one of which would eventually become §1983, could not have been laboring under the impression that the common law of either England or the United States unalterably, uniformly, or universally held that judges were absolutely immune from traditional remedies at law. It was not until a year after Congress enacted the predecessor to §1983 (17 Stat. 13 (1871))that Justice

Field who had written *Randall*, amended the holding in *Bradley v. Fisher*, 80 U.S. (13 Wall.)335 (1872)), so that judges in courts of general jurisdiction were not liable for their judicial acts even when they acted in excess of their jurisdiction and maliciously or corruptly.

In the light of this history, it is disingenous to say that if Congress had wanted to abrogate absolute immunity for judges it "would [have] specifically so provided . . . " *Pierson v. Ray*, 386 U.S. 547, 555 (1967). The "diligent congressman, looking to the federal rule in 1871, would have had no reason not to surmise that an incorrect ruling of law, maliciously made, which deprived an individual of his constitutional rights, would probably subject the offending judge to liability." Note, *Liability of Judicial Officers Under Section 1983*, 79 Yale L.J. 322, 326 (1969).

There seemed to be little doubt seventy-five years later that absolute judicial immunity had been abolished. In deciding whether a civil action for compensatory and punitive damages could lie under then R.S. §1979 (now §1983) against a justice of the peace who refused a hearing to plaintiffs after arrest, the Third Circuit Court of Appeals ruled that "if the plaintiffs . . . were deprived of a federal right by state officials or officers acting 'under color of any law' . . . these officials must respond in damages to the plaintiffs as prescribed by R.S. §1979." *Picking v. Pennsylvania R. Co.*, 151 F.2d 240, 249 (3rd Cir. 1945). It continued, "As we read R.S. 1979 . . . we are compelled to the conclusion that Congress gave a right of action sounding in tort to every individual whose federal rights were trespassed upon by any officer acting under pretense of state law." *Id.*

at 249. Facing the issue of a common law bar to judicial liability the court found

> that the conclusion is irresistible that Congress by enacting the Civil Rights Act sub judice intended to abrogate the privilege to the extent indicated by that Act and in fact did so. Section 1 of the third Civil Rights Act explicitly applied to 'any person' . . . We can imagine no broader definition. *Id.* at 250.

It is conceded that *Picking* was expressly overruled by the third circuit in *Bauers v. Heisel*, 361 F.2d 581 (3rd Cir. 1966). However, *Bauers* was decided before *Pierson* and relied primarily, but inappropriately, on the Supreme Court's decision in *Tenney v. Brandhove*, 341 U.S. 367 (1951). *Bauers v. Heisel*, 361 F.2d 581, 584-586 (3d Cir. 1966). *Tenney* held state legislators absolutely immune from money damage liability under one of the predecessors to §1983. But to ground judicial immunity on the basis of legislative immunity is genuinely to misread both the common law and the legislative history of the Civil Rights Act. "The immunity of legislators was more strongly entrenched in Anglo-American law prior to 1871 than was judicial immunity." Note, *Immunity of Federal and State Judges from Civil Suit – Time for a Qualified Immunity?* 27 Case West L. Rev. 727, 736 n. 49 (1977). In 1951, when *Tenney* was decided, "forty-one of the forty-eight States . . . [had] specific provisions in their Constitutions protecting the privilege." *Tenney v. Brandhove*, 341 U.S. 367, 375 (1951). Moreover, one could find support for state legislative immunity in the Speech and Debate Clause of the United States Constitution, U.S. Const. Art. I, §6 (although three states had already written analogous provisions in their constitutions even before 1789, *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951)). Thus,

this Court reasonably could have doubted, as it did, "that Congress – itself a staunch advocate of legislative freedom – would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language [of §1983)." *Id.* at 376.

But, no such conclusion can be drawn with regard to judicial immunity and thus *Bauers'* reliance on *Tenney* in overruling *Picking* is misplaced. The common law did not unequivocally protect judges. There is no constitutional compulsion for judicial immunity as there is for legislators. The post Civil War Congress clearly expressed its disdain for judicial autonomy when it repealed the right of the Supreme Court to review habeas corpus cases, *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869); and, as will be shown, the legislative history of the 1871 Civil Rights Act clearly contemplated that judges would be liable for money damages. This Court has never been a slave to the common law, *e.g.*, *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (burden of proof in provocation defense); *Williams v. Florida*, 399 U.S. 78 (1970) (less than twelve person jury constitutional); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (less than unanimous jury constitutional); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (actual malice standard in libel actions by public officials). In any event, however one interprets the common law with respect to judicial immunity, when a statute is designed as a revision of a body of law, the common law gives way to the statute which is inconsistent with it. *See Hamilton v. Rathbone*, 175 U.S. 414, 418 (1899); *see also, Pierson v. Ray*, 386 U.S. 547, 561 (1967) (Douglas, J., dissenting). The legislative history of §1983 reviewed immediately below unequivocally supports the contention that it was intended to hold state judges liable in money damages for their judicial

acts when those acts deprived persons of their constitutional rights.

2. The Legislative History of the 1871 Civil Rights Act

The historical underpinnings of §1983 have been amply described by this Court:

> Section 1979 [predecessor to §1983] came onto the books as §1 of the Ku Klux Act of April 20, 1871. 17 Stat. 13. It was one of the means whereby Congress exercised the power vested in it by §5 of the Fourteenth Amendment to enforce the provisions of that Amendment. Senator Edmunds, Chairman of the Senate Committee on the Judiciary, said concerning this section:
>
> > "The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill [Act of April 9, 1866, 14 Stat. 27], which has since become a part of the Constitution," *viz.*, the Fourteenth Amendment.
>
> *Monroe v. Pape*, 365 U.S. 167, 171 (1961); *see also Id.* at 171-185.

Because §1983 is a direct descendant of the Civil Rights Act of 1866, a detailed inquiry into the precise purposes and intent of the 42nd Congress with regard to judicial immunity

in passing the former properly begins with scrutiny of the latter:

> [The Supreme] Court has traced the origin of §1983 and its jurisdictional counterpart to the Civil Rights Act of 1866, 14 Stat. 27. (citations omitted). That Act guaranteed "broad and sweeping . . . protection" to basic civil rights. (citations omitted).
>
> The Fourteenth Amendment vindicated for all persons the rights established by the Act of 1866. (citations omitted) . . .
>
> The broad concept of civil rights embodied in the 1866 Act and in the Fourteenth Amendment is unmistakenly evident in the legislative history of §1 of the Civil Rights Act of 1871, 17 Stat. 13, the direct lineal ancestor of §§1983 and 1343 (3). Not only was §1 of the 1871 Act derived from §2 of the 1866 Act, but the 1871 Act was passed for the express purpose of "enforc[ing] the Provisions of the Fourteenth Amendment."
> *Lynch v. Household Finance Corp.*, 405 U.S. 538, 543-545 (1972); *accord, Mitchum v. Foster*, 407 U.S. 225 (1972).

This interpretation of the reach and meaning of §1983 is directly supported by the remarks of Rep. Shellabarger to the House of Representatives in reporting out the Ku Klux Act of 1871: "The model for it will be found in the second section of the act of April 9, 1866 . . . That section provides a criminal proceeding in *identically the same case* as this one provides a civil remedy . . . " Cong. Globe, 42nd Cong., 1st Sess., app. 68 (1871) (emphasis added).

What, then, were the cases in which criminal proceedings were envisioned and who were considered to be proper

defendants in those cases? Scrutiny of the legislative history of the 1866 Act unmistakably indicates that both proponents and opponents of the bill in the Senate and the House contemplated that judges would be potential defendants. Sen. Trumbull, one of its sponsors viewed §2 as "the valuable section . . . When it comes to be understood . . . that any person who shall deprive another of any right . . . will expose himself to fine and imprisonment, I think such acts will cease." Cong. Globe, 39th Cong., 1st Sess., 475 (1866).[29]

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[29] In a colloquy between Sen. Trumbull and Sen. Cowan, one of the opponents of the bill, which followed the assertion quoted immediately above, it became clear that judges were not to be absolutely immune from the reach of the 1866 Act:

> Sen Cowan: [A]s I understand the bill, this kind of case might occur: The State judge might be honestly of the opinion that a State law was not in conflict with the United States law, and yet, as I understand it, he may be dragged into the United States court and punished in that court as a criminal by fine and imprisonment . . .
>
> Sen. Trumbull: [I]f an honest judge misconceives the law, and makes a mistake in judgment without any intention to disregard the law, would any jury in America convict him? He will be in no danger.
>
> Sen. Cowan: Then I will ask if that does not come into conflict with another principle of law – whether a judge in a criminal court can be held responsible for the integrity of his intentions as to the decisions he makes?
>
> Sen. Trumbull: . . . If he is not responsible, I have faith that the judges of the United States courts will so decide. The bill provides that persons who

Not only did both houses of Congress explicitly recognize that §2 of the 1866 Act would subject judges to criminal prosecution, but so did the President of the United States, Andrew Johnson. In his message to Congress, explaining his reasons for vetoing the measure, he declared:

> [I]t is therefore assumed that under this section . . . that judges of the State courts who should render judgments in antagonism with its terms . . . could be brought before other tribunals

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Footnote [29] (Continued)

> subject others to punishment in consequence of race or color and not in consequence of crime, shall themselves be punished, and that this may be done in the United States courts.
> Cong. Globe, 39th Cong., 1st Sess., 475-476 (1866).

A similar exchange occurred in the House between Rep. Eldridge and Rep. Thayer:

> Rep. Eldridge: [Referring to §2] This bill . . . seeks to lay prostrate at the feet of the Federal Government the judiciary of the States . . . [I]t attempts to destroy the independence of the State judiciary.
>
> [L]et me ask the gentleman from Pennsylvania, [Mr. Thayer], by what provision of the Constitution is the Federal Government authorized to affix a penalty to the decision which the judge of a State court may make in the exercise of the judicial function?
>
> Rep. Thayer: . . . I ask the gentlemen from Wisconsin whether in his judgment the United States have not the right constitutionally to enforce its own laws by pains and penalties?
> Cong. Globe, 39th Cong., 1st Sess., 1154-1155 (1866).

> and there subjected to fines and imprisonment . . .
> Cong. Globe, 39th Cong., 1st Sess., 1680 (1866).

In responding to the President's veto (later overridden), Sen. Trumbull, admitted "that a . . . judge, if he acts corruptly or viciously in the execution or under color of an illegal act, may and ought to be punished; . . ." Cong. Globe, 39th Cong., 1st Sess., 1758 (1866).

Thus, the criminal analogue of the 1871 Civil Rights Act, *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972); *Monroe v. Pape*, 365 U.S. 167 (1961); *Screws v. United States*, 325 U.S. 91 (1945); *Littleton v. Berbling*, 468 F.2d 389, 399 (7th Cir. 1972) *rev'd on other grounds O'Shea v. Littleton*, 414 U.S. 488 (1974), undoubtedly imposed penalties on state judges:

> On at least two occasions amendments to delete the imposition of criminal liability on state judges were unsuccessfully introduced. Interestingly enough, the second such amendment would have substituted *civil liability* for judges (in words almost identical to §1983) for criminal liability. The Act's sponsor, in opposing this amendment, pertinently commented that the issues as to criminal and civil liability were identical – if Congress could constitutionally make judges civilly liable, it could make them criminally liable and vice versa. A leading spokesman for judicial liability was Representative Shellabarger, the *author of the Ku Klux Klan Act of 1871.*[30] Kates, *Immunity of State Judges Under the Federal Civil Rights Act: Pierson v. Ray Reconsidered*, 75 Nw. U.L. Rev. 615, 622 and notes therein (1970).

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[30] "It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951) quoted in *Bauers v. Heisel*, 361 F.2d 581, 588 n.8 (3rd Cir. 1966).

It is not solely through reliance on the 1866 Act that one concludes that §1983 abolished judicial immunity. As with its criminal counterpart, the legislative history of the 1871 statute indicates that both its advocates and opponents understood that the "breadth of [its] remedy," *Monroe v. Pape*, 365 U.S. 167, 178 (1961), would cover judges.

Proponents of the Act perceived the courts as one of the major sources of the deprivation of rights. Representative Perry viewed judges, "having ears to hear [but] hear not," permitting "gangs of assassins" literally to get away with murder, Cong. Globe, 42nd Cong., 1st Sess., app. 78 (1871). "In the presence of these gangs . . . all the processes of justice sulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice." *Id.* Rep. Garfield expressed the concern that the chief problem was not unequal law but that because of "systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them." Cong. Globe, 42nd Cong., 1st Sess., app. 153 (1871). The remedy, he said, was for "Congress to step in and provide for doing justice to those persons who are thus denied equal protection." *Id.* Rep. Platt complained that it was almost impossible to "secure as plaintiff or defendant anything like equal justice before the courts of the State." Cong. Globe, 42nd Cong., 1st Sess., app. 185 (1871). Warming to the debate, he continued his litany of charges:

> [T]he old Democratic officers . . . are sustained in their course by the county judge; . . . the decisions of the county judges, who are made little kings, with almost despotic powers . . . – powers which almost without exception have been exercised . . . without regard to law or justice, make

> up a catalogue of wrongs, outrageous violations, and evasions of the spirit of the new constitution, unscrupulous malignity and partisan hate never paralleled in the history of parties in this country or any other.
> *Id.* at app. 186.

Rep. Porter referred to these violations and evasions as "legalized outrages," Cong. Globe, 42nd Cong., 1st Sess., app. 277 (1871), which he demanded the Act to reach. Yet, despite the fact that judges "were parties or in sympathy" to these outrages "or paralyzed by fear . . . ." Rep. Stevenson was alarmed that without passage of the Act, there would be "no relief for the injured." Cong. Globe, 42nd Cong., 1st Sess. app. 297 (1871).

Not only did proponents envision judicial liability. Rep. Arthur, a vehement opponent declared that, "Hitherto, in all the history of this country and of England, no judge or court has been held liable, civilly or criminally, for judicial acts . . . Willfulness and corruption. . .alone created a liability. . . Cong. Globe, 42nd Cong., 1st Sess. 365 (1871). Thus, he clearly recognized that §1 would abrogate whatever judicial immunity existed in 1871. Rep. Lewis also recognized the importance of the future §1983: "By the first section, in certain cases, the judge of a State court, though acting under oath of office, is made liable to a suit in the Federal court and subject to damages for his decision against a suitor, however honest and conscientious that decision may be . . . " Cong. Globe, 42nd Cong., 1st Sess., 385 (1871). Rep. Lewis, therefore, contemplated civil actions even when judges acted within their jurisdiction and without malice. These incursions on judicial immunity of state judges were defended by Rep. Lowe who asserted that there was no other legal machinery available for enforcing the fourteenth amendment than to "throw open the doors of the United States courts to those

whose rights under the Constitution are denied or impaired." Cong. Globe, 42nd Cong., 1st Sess. 376 (1871).

This delineation of the legislative history in no way exhausts the support found in that history for the proposition that §1 of the Civil Rights Acts of 1871 was intended to create civil liability for judicial officers.[31] See also Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 Nw. U. L. Rev. 615 (1970); Note, *Immunity of Federal and States Judges from Civil Suit – Time for a Qualified Immunity?* 27 Case West. Res. L. Rev. 727 (1977); Note, *Liability of Judicial Officer Under Section 1983*, 79 Yale L.J. 322 (1969). Whatever may have been the case with legislators, it is clearly erroneous to presume that Congress did not specifically wish to abolish the doctrine of absolute judicial immunity in civil rights cases.

This Court, both before and after *Pierson*, has continually construed the Civil Rights Acts to accord them "a sweep as broad as its language." *United States v. Guest*, 383 U.S. 745, 801 (1966); *accord*, *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *United States v. Price*, 383 U.S. 787 (1966). Justice Douglas' assertion that remedial statutes are to be liberally construed, *Pierson v. Ray*, 386 U.S. 547, 561 n. 1 (1967) (Douglas, J., dissenting), is not only an accepted canon of statutory construction, but the legislative history of the 1871 Civil Rights Act indicates that the statute should be construed

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[31] Similar support, though not as extensive, exists for the conspiracy provisions of the Act (now 42 U.S.C. §1985). *See e.g.*, Cong. Globe, 42nd, 1st Sess., 366 (1871) (Rep. Arthur); *Id.* at app. 167 (Rep. Pool).

in precisely that manner. In speaking of §1, Rep. Shallabargar, its sponsor, said:

> This act is remedial, and in the aid of the preservation of human liberty and human rights. All statutes . . . are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and gives remedies for their wrongs to all the people.
> Cong. Globe, 1st Sess., app. 68 (1871).

One hundred years later, this Court left no doubt that §1 was to be given the broad scope intended by Rep. Shellabarger:

> It is clear from the legislative debates surrounding the passage of §1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment "against State action, . . . whether that action be executive, legislative, or *judicial*." *Ex parte Virginia*, 100 U.S. 339, 346. Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop the deprivations or were in league with those who were bent on abrogation of federally protected rights.
>
> . . . .
>
> Those who opposed the Act of 1871 clearly recognized that the proponents were extending federal power in an attempt to remedy the state

courts' failure to secure federal rights. The debate was not about whether the predecessor of §1983 extended to actions of state courts, but whether this innovation was necessary or desirable.

> This legislative history makes evident that Congress . . . was concerned that state instrumentalities could not protect [federally created] rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.
> *Mitchum v. Foster*, 407 U.S. 225, 240-242 (1972).

After surveying the legislative history of §1983 in *Mitchum*, Justice Stewart, in his opinion for the Court, concluded that in carrying out the purpose of the statute – to interpose the federal courts between the States and the people when executive, legislative, or judicial action deprived persons of their federal rights – Congress plainly permitted injunctive relief because, he said, §1983 "expressly authoriz[ed] a 'suit in equity' as one of the means of redress." *Id.* at 242. In like manner, the very same statute expressly authorizes "any action of law." 42 U.S.C. §1983.

C. The Interests Undergirding the Continuance of Absolute Judicial Immunity From Civil Damage Liability Under Section 1983 Are Not Logically Supportable.

In vindicating constitutional rights this Court has upheld as against judges, the use of criminal penalties, *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974); *cf. Ex parte Virginia*, 100 U.S. 339 (1880), and, in certain prescribed instances, injunctions, *Mitchum v. Foster*, 407 U.S. 225 (1972). In addition, it has, despite common law, *Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974) and precedent, *Spalding v. Vilas*, 161 U.S. 483 (1896),

abrogated absolute immunity for money damage liability for government officials in the executive branch, even when they act within the scope of their powers. *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Yet, it has created a barrier to such recovery when state judicial officers engage in conduct leading to a denial, dilution, or abrogation of constitutional rights. However, rather than perpetuate the existence of this barrier, *amici* urge a "considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976). The review of the common law in Section II B 1, *supra*, has already eroded some of the foundations of the doctrine of judicial immunity; scrutiny of the interests behind it should further its collapse.

The judicial immunity doctrine is largely judge-made. *Doe v. McMillan*, 412 U.S. 306, 318 (1973). The doctrine "is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." *Barr v. Batteo*, 360 U.S. 564, 572-573 (1959). This Court has proferred two bases for judicial immunity: (1) [J]udges should be at liberty to exercise their functions with independence and without fear of consequences." *Pierson v. Ray*, 386 547, 554 (1967); (2) Judges "should not have to fear that unsatisfied litigants may hound [them] with litigation . . . " *Id.* These two contentions by no means exhaust the policy justifications. They include, in addition to the need for an independent judiciary and the possibility of harassing and vexatious litigation, the need for finality in judicial proceedings, the possibility of diminished respect for judges, the establishment of disincentives to entrance into the judiciary, the concern that decision-making will be influenced by fear of subsequent suit, the assertion that duty of judges is to the public and not

to private citizens, and the belief that alternate means exist for redress of grievances. *See Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 347-350 (1872); *Randall v. Brigham,* 74 U.S. (7 Wall.) 523 (1868); *Yaselli v. Goff,* 12 F.2d 396, 399-404 (2d Cir. 1926) *aff'd per curiam* 275 U.S. 503 (1927); *see generally Littleton v. Berbling,* 468 F.2d 389, 412-413 (7th Cir. 1972) *rev'd on other grounds, O'Shea v. Littleton,* 414 U.S. 488 (1974); McCormack & Kirkpatrick, *Immunities of State Officials Under Section 1983,* Rutgers-Camden L.J. 65, 69-71 (1976); Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray, Reconsidered,* 63 Nw. U.L. Rev. 615, 633-637; Jennings, *Tort Liability of Administrative Officers,* 21 Minn. L. Rev. 263, 271-272 (1936); Note, *Immunity of Federal and State Judges from Civil Suit – Time for a Qualified Immunity?,* 27 Case West. Res. L. Rev. 727, 741-743 (1977); Note, *Liability of Judicial Officers Under Section 1983,* 79 Yale L.J. 322, 329-334 (1969). Each of these contentions has been considered inadequate or erroneous support for the continuance of absolute immunity *See* Brazier, *Judicial Immunity and the Independence of the Judiciary,* Public Opinion 397 (Winter 1976); Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray, Reconsidered,* 65 Nw. U.L. Rev. 615, 633-637 (1970); Note, *Immunity of Federal and State Judges from Civil Suit-Time for a Qualified Immunity?,* 27 Case West. Res. L. Rev. 727, 741-743 (1977); Note, *Liability of Judicial Officers Under Section 1983,* 79 Yale L.J. 322, 329-334 (1969). In addition, *amici* wish to stress two points in subsections D and E below.

D. The Justifications Offered For Absolute Judicial Immunity Apply Equally to Other State Officials for Whom This Court Has Abolished the Doctrine.

Late in the last century this Court upheld absolute immunity for executive officials:

> [T]he same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by the heads of Executive Departments when engaged in the discharge of duties imposed upon them by law.
> *Spalding v. Vilas,* 161 U.S. 483, 498 (1896).

Yet, three quarters of a century later, this Court found the policy reasons alluded to no longer appropriate and held that executive officers were not to be accorded the privilege of absolute immunity. *Scheuer v. Rhodes,* 416 U.S. 232 (1974). In reviewing the scope of §1983, the Court found that it was designed to prevent the misuse of power possessed by virtue of state law and thus could not exempt government officials totally from money damage liability. *Id.* at 243 citing *Monroe v. Pape,* 365 U.S. 167 (1961) and *United States v. Classic,* 313 U.S. 299 (1941). It further reasoned that:

> Under the criteria developed by precedents of this Court, §1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer has "the quality of a supreme and unchangeable edict, overriding all conflicting rights . . . unreviewable through the judicial power of the Federal Government." (citation omitted).
> *Id.* at 248.

In reaching this conclusion the Court relied heavily on Chief Justice Hughes assertion that:

> When there is a substantial showing that the exertion of state power has overriden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression.
> *Sterling v. Constantin*, 287 U.S. 378, 398 (1932).

The situation envisioned by the Chief Justice exists here. By the putative assertion of state power a judge has forever foreclosed the possibility of exercising one constitutional right, *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation) and trespassed on another, *Roe v. Wade*, 410 U.S. 113 (1973) (self-determination with regard to bodily integrity). Nothing less than a civil suit for damages can vindicate involuntary loss of these rights. Petitioner ordered an invasive operation without a hearing, without the production of evidence, without counsel for the patient, and under conditions amounting to misrepresentation, if not fraud. That operation has taken place and neither it nor the acts of the Petitioner which permitted the irreversible abrogation of fundamental rights can be enjoined. *See* Section IIIA. If a governor of a large state who is forced to make rapid decisions in the face of civil disorder is not absolutely immune for his actions, there is no rational basis for barring a civil suit against a judge who, by virtue of his office and the nature of the proceeding, has considerably more time to contemplate and reflect before arriving at a decision.

E. If Injunctions Against State Judicial Officers Are Permissible, It Is Unreasonable to Bar Money Damage Recovery.

There is no absolute bar to injunctive relief against the action of state judges. *Mitchum v. Foster*, 407 U.S. 225

(1972); *Erdmann v. Stevens;* 458 F.2d 1205 (2d Cir. 1972); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117 (S.D. N.Y. 1969). Yet, all of the policy bases for barring civil suits pertain to the granting of injunctions. The availability of injunctive relief opens judicial officers to harassing and vexatious litigation, may create undue influence on decision-making, could diminish respect for the judiciary, and lengthens judicial proceedings. More pertinently, availability of the injunction creates the potential for civil contempt in those instances where it is disobeyed, even when the injunction may not be proper. *Cf. Walker v. City of Birmingham*, 388 U.S. 307 (1967). Compensatory relief is the proper remedy for civil contempt and thus the enforcement phase of an injunction is comparable to a damage action. Address by Prof. Fiss, Civil Rights Injunction, Addison C. Harris Memorial Lectures, Indiana University 8 (April 5 & 6, 1976). "The citizen-plaintiff can commence an enforcement proceeding designed to coerce compliance with the injunction . . . He can also seek to obtain compensation for the harm caused by the violation." *Id.* at 21. This Court has specifically permitted compensatory damage recovery for civil contempt. *Leman v. Krentlar-Arnold Hinge Last Co.*, 284 U.S. 448 (1932).

It is thus anomalous to permit damage recovery in one context and not in another, in the light of the proferred justifications for the absolute immunity rule. A bar to money damage also precludes recovery in situations where injunctive relief is no longer available, as in this case. More fundamentally, however, distinctions between or among remedies creates dangers inherent in any hierarchical conception of remedies:

> [W]e should not supplant one remedial hierarchy with another. Instead we should move to a

> non-hierchical conception of remedies. The choice of remedy should not turn on generalized propositions – couched in the obscure but colorful language of history – about which remedies are favored and which are disfavored. Instead, it should turn upon an appreciation of the technical advantages of each remedy, and a judgment, made in the light of the substantive claim, about the desirability of the allocation of power that is implicit in each remedial system.
> Address by Prof. Fiss, The Civil Rights Injunction, Addison C. Harris Memorial Lectures, Indiana University 96-97 (April 5 & 6, 1976).

Under a system of total immunity no reasoned choices among remedies is available. There is no opportunity to balance the public good that might be posited for immunity in a particular instance against the right of private citizens to recover for egregious violation of constitutional rights. The present system precludes case by case analysis and rests solely on the conclusive presumption that the public good is invariably served by the absolute immunity doctrine.

Abrogation of absolute immunity in Germany and France has not undermined their judicial systems. Note, *Immunity of Federal and State Judges From Civil Suit – Time for a Qualified Immunity?*, 27 Case West. Res. L. Rev. 727, 743-751 (1977). The protection of the public, the judiciary, and the injured plaintiff is better served through the development of standards both for deterring harassing litigation, Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 Nw. U.L. Rev. 615, 633-637 (1970), and adjudicating claims against judicial officers. Note, *Immunity of Federal and State Judges from Civil Suit – Time for a Qualified Immunity?*, 27 Case West. Res. L. Rev. 727, 766-767 (1977).

III.

IF NOT TOTALLY ABOLISHED, THE DOCTRINE OF JUDICIAL IMMUNITY SHOULD BE ATTENUATED TO ALLOW THE RECOVERY OF DAMAGES IN SITUATIONS WHERE A JUDICIAL ACT CREATES AN IRREVERSIBLE ABROGATION OF FUNDAMENTAL RIGHTS WITHOUT ANY ALTERNATIVE REMEDY.

Amici have contended, in Section II, *supra*, that *Pierson v. Ray*, 386 U.S. 547 (1967) was wrongly decided and that judicial immunity as a bar to money damages in actions under 42 U.S.C. § 1983 should be abolished. However, even if *Pierson* is allowed to stand, *amici* submit that the doctrine of judicial immunity should not be applied in a situation like the present case where its application would result in the deprivation of fundamental constitutional rights without any remedy.

A. The Fundamental Constitutional Rights At Stake

It is well settled that a state official's acts, under color of state law, which deprive a person of rights protected under the United States Constitution, provide ample basis for an action under 42 U.S.C. 1983. *See* Section IIA, *supra*. In the instant case Petitioner's authorization of sterilization for Respondent deprived her of fundamental constitutional rights to privacy and to procreate. Like the other civil rights which this Court has recognized as fundamental, i.e., voting, *see Williams v. Rhodes*, 393 U.S. 23 (1968), and political association, *see Mine Workers v. Illinois Bar Association*, 389 U.S. 217 (1967), the rights to privacy and to procreate are deeply rooted in our traditions and basic to our system of

liberty. As this Court has described fundamental constitutional rights:

> (T)hey are . . . the very essence of a scheme of ordered liberty. To abolish them is . . . to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (citations omitted)
> *Palko v. Connecticut*, 302 U.S. 319 325 (1937); *see also, Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

An examination of the doctrines of the rights to privacy and to procreate as they had developed by 1971 (when Petitioner acted to deprive Respondent of these rights) reveals that these rights are fundamental. This Court had stated explicitly that the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy was a fundamental right. *Stanley v. Georgia*, 394 U.S. 557 (1969). Although in *Stanley*, this Court addressed the question of privacy in relation to the First Amendment, the *Stanley* decision in fact represented application of a firmly established doctrine in a new context. In a long line of cases this Court has consistently acknowledged a right to privacy of one's person either as within the liberty interest protected by the fourth and fourteenth amendments or as an essential part of our common law heritage. *See Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891), ("the right of every individual to the possession and control of his own person"), *Jacobson v. Massachusetts*, 197 U.S. 11, 29 1905, ("a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), ("freedom from bodily restraint"); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), ("the right to be let alone"). It was precisely this

sphere of personal privacy, long recognized under the Constitution and common law, that Petitioner invaded when he approved Respondent's sterilization.

Moreover, not only was Respondent's right to privacy at stake in this case, but so was her related right to procreate, or to be free from involuntary sterilization. Because sterilization is an irreversible medical procedure, it permanently prohibits the person upon whom it is performed from bearing or begetting children. Therefore, Respondent's right to be free from involuntary sterilization is inherent in her right to procreate.

Like the right to privacy, the right to procreate is fundamental. In 1942 this Court considered the issue of procreation in the landmark case of *Skinner v. Oklahoma*, 316 U.S. 535 (1942). In striking down the state criminal statute in question as a violation of equal protection, this Court stated:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.
> *Id.* at 541.

Thus this Court recognized procreation as a fundamental civil right, identifying its basis as the necessity to preserve the right to procreate for all individuals whose survival could be jeopardized by indiscriminate approval of an irreversible

operation. The Court's elevation of procreation to the stature of a fundamental right in *Skinner* was underscored in *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) when the Court characterized *Skinner* as a right to privacy case, leaving no doubt about its importance. *Skinner* was not merely an expression of the right to procreate within the narrow confines of an equal protection challenge to a criminal statute; it was a watershed opinion of the same magnitude as the right to privacy cases which had preceded it. *See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 34, n. 76 (1973).[32]

Skinner and *Griswold* make it clear that long before 1971, when Petitioner approved the sterilization of Respondent, procreation was an established constitutional right. The evolution of constitutional doctrine in recent years has made it clear that the rights to privacy and to procreate are closely related both in source and in application. *See Roe v. Wade*, 410 U.S. 113, 152 (1973). The consequence of this dual development in constitutional doctrine by 1971 was that Respondent had clearly established and fundamental constitutional rights at stake when Petitioner authorized the sterilization that permanently deprived her of the ability to exercise those rights.

B. Damages Is The Only Remedy Available and Appropriate to Redress the Violation of Respondent's Constitutional Rights Caused by Petitioner's Authorization of Her Sterilization.

It might seem that it is unnecessary for this Court to find Petitioner liable in damages because a host of more appropriate remedies are available to resolve the dispute in

[32] Later cases dealing with the right to bear and beget children include: *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

this case. In reality, however, this proposition is untrue; no remedies except damages are available or appropriate to compensate Respondent for the permanent violations to her constitutional rights which Petitioner caused. The traditional equitable remedies are all inadequate. The coercive remedy of injunction can provide no relief; it is too late to enjoin Petitioner from permitting an operation which has already occurred. A declaratory judgment would be a hollow gesture for the same reason. Similarly, restitutionary relief is wholly inadequate since no judicial decree can restore to Respondent the precious personal rights of which Petitioner has deprived her.

It might also be argued that the proper way to challenge a judicial decision is to appeal from it, *Pierson v. Ray*, 386 U.S. 547, 554 (1967), and that this is the course Respondent should have followed. *Pierson v. Ray* concerned the liability of a judge in damages under 42 U.S.C. §1983 for an unconstitutional conviction. Judicial conduct in that context is, of course, appealable or subject to habeas corpus relief. *Cf. O'Shea v. Littleton*, 414 U.S. 488, 502 (1974). The instant case, however, did not arise from an illegal criminal conviction. Thus post-conviction remedies are inappropriate for Respondent to pursue. Moreover, these options were foreclosed to Respondent altogether. Respondent had no knowledge that the operation performed on her on July 16, 1971, was a sterilization procedure. At the time, she was told it was to be an appendectomy. *Sparkman v. McFarlin*, 552 F.2d 172, 173 (7th Cir. 1977). It was not until May of 1975 that Respondent learned from her attorney that he had reviewed a letter from the surgeon who had performed the operation in which its true nature was disclosed. Moreover, at no point during this four year period was Respondent represented by counsel. Indeed, it was not until she sought legal advice in 1975 in connection with her marital problems

that Respondent had ever discussed the sterilization operation with an attorney. This combination of factors – deception, lack of information, lack of knowledge that she should seek legal counsel – all made it impossible for Respondent to appeal from or to mount any collateral attack to Petitioner's authorization of her sterilization in time to prevent its occurrence.[33]

Despite the unavailability of certain equitable remedies or appellate review, it might be asserted that the doctrine of judicial immunity never contemplated immunization of the judiciary for the criminal deprivation of constitutional rights and therefore the appropriate action for Respondent to take would be to file criminal charges so that prosecution could be initiated under state law or under 18 U.S.C. §242, the criminal analogue to 42 U.S.C. §1983; *see Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974); *Ex parte Virginia*, 100 U.S. 339 (1879). The remedy of criminal prosecution is, however, insufficient to compensate Respondent for the loss of her constitutionally protected rights. Prosecution under state or federal law is discretionary with the prosecutor; it may never occur. Moreover, even a successful criminal prosecution would be an inadequate remedy in the instant case because, at best, it would result in punishment of Petitioner without requiring him to take any action which would vindicate Respondent's constitutional rights. It is simply an inappropriate sanction where compensation for permanently denied personal rights is sought.

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[33] Moreover, even if appeal had been available to Respondent, the fact that a person need not pursue his state remedies before instituting a §1983 action, *Monroe v. Pape*, 365 U.S. 167 (1961), would seem to indicate that appealability is not a sufficient protection where it is alleged that constitutional rights have been violated.

Lastly, it might be contended that, even if equitable, appellate and criminal remedies are insufficient, impeachment of Petitioner is a solution yet open to Respondent. This remedy, however, is no more adequate than the rest. Impeachment is ineffective because it is seldom used[34] because legislators frequently may be unwilling to avenge a judicial harm to a particular individual. Moreover, even if impeachment is invoked with success, the person injured gains no benefit except revenge.[35] For these reasons the slim possibility of that Petitioner might be impeached affords no relief commensurate with the deprivations Respondent has endured.

Having demonstrated the insufficiency of alternative remedies, *amici* turn now to a justification of damages as the only appropriate remedy in this case. As this Court stated so forcefully in the case of *Marbury v. Madison*, 1 Cranch 137 (1803).

> . . . it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded (citing 3 Blackstone's Commentaries 23).
> *Id.* at 163.

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[34] Note, *The Liability of Judicial Offenders Under Section 1983*, 79 Yale L.J. 322 (1969). "A survey of forty states found that a total of only fifty-two impeachment proceedings had ever been instituted, resulting in nineteen removals. Brand, *The Discipline of Judges*, 46 ABAJ 1315 (1960). *See* Miller, *Discipline of Judges*, 50 Mich. L. Rev. 737 (1952)." *Id.* at 332-333 n. 57.

[35] Note, *The Liability of Judicial Officers Under Section 1983*, 79 Yale L.J. 322, 333 (1969).

This principle has been relied upon consistently by this Court in permitting the recovery of damages in cases litigated under federal statutes which created a right without specifying a remedy. *Texas and New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930); *Texas and Pacific Railway Co. v. Rigsby*, 241 U.S. 33 (1916). Moreover, in a pair of cases like the instant one where the conduct of state judicial officers was challenged as violative of the fourteenth amendment, this Court permitted plaintiffs to bring a cause of action for damages: *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927). Similarly, the principle enunciated in *Marbury v. Madison*, 1 Cranch 137, 163 (1803), has been applied to allow an award of damages in cases challenging actions by federal officials who invaded constitutional rights. For instance, in *Bell v. Hood*, 327 U.S. 678, 684 (1946), this Court, citing *Marbury* and *Texas and New Orleans Railroad Co.*, 281 U.S. 548 (1930), allowed private citizens to sue for damages in federal district court to contest the actions of F.B.I. agents for alleged violations of the fourth and fifth amendments even though those amendments did not expressly create such a remedy.[36] In so ruling, this Court recognized that "where legal rights have been invaded, and a federal statute provides

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[36] *See also, Terry v. Ohio*, 392 U.S. 1, 15 (1968), where this Court stated that its approval of restrained investigative conduct by police officers was not meant to discourage the use of remedies other than the exclusionary role to curtail uses for which that sanction might prove inappropriate. In *Ingraham v. Wright*, 430 U.S. 651 (1977), this Court cited *Terry v. Ohio* to reaffirm and clarify its statement in that case. "The reasonableness of a warrantless public arrest may be subjected to subsequent judicial scrutiny in a civil action against the law enforcement officer . . . "
Id. at 680 n. 48.

for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."
Bell v. Hood, 327 U.S. 678, 684 (1946).

Relying upon *Bell v. Hood* and *Nixon v. Condon*, this Court also permitted citizens to bring a cause of action for damages to contest an arrest and search by F.B.I. agents as violative of the personal right of privacy protected by the fourth amendment. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In reaching this decision, this Court noted what *amici* pray it consider in this case: "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id.* at 395.

Not only has this Court permitted damage actions to lie in situations like those described above to compensate for violations of fundamental constitutional rights, this Court allowed a damage action in a recent case litigated under provisions of federal civil rights statutes similar to the ones relied upon by *amici*. In *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), black citizens sued a Virginia corporation alleging its conduct constituted invasions of their rights under 42 U.S.C. § § 1981 and 1982. This Court found that a cause of action for damages could lie, reasoning that, "Congress by 28 U.S.C. § 1343(4), created federal jurisdiction for 'damages or . . . equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ' " *Id.* at 238. Furthermore, in discussing the appropriateness of damages as a remedy, the Court stated, "The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired." *Id.* at 240.

Although the principles discussed above regarding damages did not develop in the specific context of allegations raised under 42 U.S.C. §1983, they should be applied with equal vigor to the case at bar. In Respondent's case, as in *Texas and New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930), and in *Texas and Pacific Railway Co. v. Rigsby*, 241 U.S. 33 (1916), federally created rights are relied upon. Also, in this case, as in *Bell v. Hood*, 327 U.S. 678 (1946), and in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), substantial invasions of federally protected interests in liberty and privacy are at issue. Similarly, as in *Nixon v. Herndon*, 273 U.S. 536 (1927), and in *Nixon v. Condon*, 286 U.S. 73 (1932) the conduct of judicial officers in violation of constitutional rights is being challenged. Finally, as in *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), this case concerns the imposition of damages as the appropriate remedy in response to the impairment of a right created by a federal civil rights statute.

Any doubt as to the propriety of permitting damages in a §1983 case should be dispelled by this Court's recent opinion in *Ingraham v. Wright*, 430 U.S. 651 (1977).[37] There, school children sued public school officials for damages in an action brought under 42 U.S.C. §§ 1981-88 in regard to paddling incidents which allegedly occurred at a public junior high school. Citing *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905); *Union*

[37] It should also be noted that the Seventh Circuit Court of Appeals readily acknowledges that courts have traditionally assessed damages for tortious injury in civil rights litigation. *See Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569, 579-580 (7th Cir. 1975).

Pacific Railway Co. v. Botsford, 141 U.S. 250 (1891); *Meyer v. Nebraska*, 262 U.S. 390 (1923); and *Palko v. Connecticut*, 302 U.S. 319 (1937) – some of the same cases cited herein to demonstrate that Respondent's fundamental constitutional rights are at issue, see Section IIIA, *supra* – this Court found that the historic interest in liberty included plaintiffs' right to be free from, and to obtain judicial relief for, unjustified intrusions upon their personal security. *Ingraham v. Wright*, 430 U.S. 651, 673 (1977). Mr. Justice Powell, writing for the majority, determined that this constitutionally protected liberty interest did not warrant the interjection of substantial procedural due process protections prior to the imposition of corporal punishment in the public schools. In rendering this decision, Mr. Justice Powell stressed that elaborate procedural due process prior to punishment was unnecessary because the child had recourse to civil and criminal proceedings to challenge excessive infliction of corporal punishment. *Id.* at 670, 678. In short, the Court reasoned that:

> The subsequent civil and criminal proceedings available in this case may be viewed as affording substantially greater protection to the child than the informal conference mandated by *Goss*.
> *Id.* at 678, n. 46.

Mr. Justice White, writing in dissent, characterized the civil proceedings quoted above as an action to recover damages, *id.* at 699 (White, J., dissenting) leaving no doubt about the meaning of Mr. Justice Powell's words. Justice Powell regarded damages as an appropriate remedy in §1983 actions to compensate individuals for invasions of their constitutional rights by public officials. Without question, Mr. Justice Powell's reasoning should be applied to the instant case. Respondent, more so than the school children in *Ingraham v. Wright*, suffered irreparable harm to her fundamental interests

in liberty. The invasion of her constitutional rights to privacy and to procreate is far more serious than the excessive corporal punishment to which Mr. Justice Powell referred as being proper for challenge in civil proceedings. For these reasons, Respondent contends that it is proper and consistent with this Court's opinion in *Ingraham v. Wright* that she be permitted to recover damages.

In summary, 42 U.S.C. §1983 was designed to guarantee a broad and sweeping protection to basic civil rights. *Lynch v. Household Finance Corporation*, 405 U.S. 538, 543-544 (1972). Respondent has illustrated amply the depths to which her basic rights have been violated. Compensation for her losses demands no less than that afforded by the genuine remedy of damages.

In essence, to uphold the doctrine of judicial immunity in cases like the one Respondent brings, will be to preclude more than money damage recovery. "The right to personal liberty or personal security can be protected only by the execution of the laws upon those who violate such rights. A failure to punish the offender is not only to deny to the person injured the protection of the laws, but to deprive him, in effect, of the rights themselves." Cong. Globe, 42nd Cong., 1st Sess., 608 (Sen. Pool).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

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Respectfully submitted,

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